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NLRB Affirms Micro-Unit

In many cases in which employers face an NLRB petition for a union representation election, the employer's ability to prevail in the election depends upon its ability to influence the composition of the election unit (a/k/a "bargaining unit" if the employer loses the election). The common wisdom is that the employer wants the bargaining unit to be as large as possible so that as many employees as possible will get the opportunity to take part in the decisions that could so vitally effect their future working lives. The unions, in contrast, want to have elections in the smallest voting units. That way, the number of votes that they require to become the certified bargaining representative of a *bargaining unit* is smaller. The only requirement was that the bargaining unit be one that is "appropriate" for collective bargaining. For example, the Board developed certain rules which required "professional employees" to be included in bargaining units that were separate from the regular rank and file employees, and that excluded guards and others charged with providing the employer's security from units made of production or retail employees.

When the Labor Act was amended in 1947 with the Taft-Hartley Act, Congress included a provision in the law that prohibited the NLRB from certifying bargaining units along the lines of the union's organizing drive (i.e., units which were comprised of just the people who supported the union). There evolved from this a line of cases that required the NLRB to form units that were comprised of employees who shared broader "communities of interest." In a retail store the presumable appropriate bargaining unit is a store-wide unit. In manufacturing the presumptively appropriate unit is a plant-wide unit comprised of production and maintenance unit. Thus, for example, where a unit only sight to represent the company's mechanics that worked on the production equipment, the Board rejected such units in favor of units encompassing larger groups of people.

This changed with the Obama Board's *Specialty Healthcare* decision that abandoned the broader bargaining unit preferences and opted instead for the more easily organized "micro-units." Even though the composition of the Labor Board was successfully challenged in the Noel Canning Supreme Court decision, the currently appointed Board that replaced it after the Supreme Court decided the *Noel Canning* case, and that was duly confirmed by the US Senate, has slavishly adopted the policies and rationales of the illegally-constituted rabidly pro-organized labor pre *Noel Canning* Board.

Earlier this week, in a 3-1 decision in Macy's Inc., the NLRB applied its controversial Specialty Healthcare decision in upholding as appropriate a bargaining unit that consists of 41 employees in the cosmetics and fragrances department at a Boston-area Macy's store, and excludes all other sales employees at the store. This is the first case in which the NLRB has applied the Specialty Healthcare standard to a retail employer. The NLRB's decision in this highly publicized case is unwelcome news for employers, particularly in the retail industry, as it provides support for unions' increasing efforts in seeking to organize "micro-units" consisting of small, discrete subsets of employees.

Summary of the Case

Macy's employs approximately 120 sales employees at its Saugus, Massachusetts store, and the employees are organized into 11 departments. The union filed a representation petition with the NLRB in which it sought to represent only the 41 employees in the cosmetics and fragrances department. That sales department is located on two different floors of the store—women's products are sold on one floor and men's products are sold on another. In November 2012, the Regional Director issued a decision and direction of election, finding that the union's petitioned-for unit was appropriate. Macy's then appealed the Regional Director's decision by filing a request for review with the NLRB.

On appeal, Macy's urged the NLRB to reject the petitioned-for unit as inappropriate, relying on pre-Specialty Healthcare decisions in which the NLRB had established a presumption in favor of storewide or "wall-to-wall" units in the retail industry. Macy's argued that under those precedents, the smallest appropriate unit must include all sales employees at the store, not merely the employees in one of the 11 departments. Macy's also argued that the petitioned-for unit would result in a "fractured" unit because the cosmetics and fragrances employees shared an overwhelming community of interest with the other sales employees.

The NLRB majority, which consisted of Chairman Pearce and Members Hirozawa and Schiffer, rejected Macy's arguments and affirmed the Regional Director's decision. Applying the standards established in *Specialty Healthcare*, the NLRB found that the petitioned-for unit was appropriate because the 41 cosmetics and fragrances employees are a "readily identifiable group who share a community of interest," and Macy's had not satisfied its burden of establishing an "overwhelming" community of interest between those employees and the sales employees in the store's 10 other departments.

The NLRB found "particularly significant" the fact that the unit tracked the departmental dividing line that Macy's had drawn. In comparing the cosmetics and fragrances employees to other sales employees, the NLRB emphasized that the employees worked in separate departments, reported to different supervisors, worked in separate physical spaces, and there was no significant contact between the employees. The NLRB distinguished the decisions cited by Macy's, and stated that more recent NLRB decisions have "evolved away from the presumptions favoring storewide units." The majority also dismissed as "speculative" Macy's suggestion that the application of the Specialty Healthcare standard to the retail industry would substantially harm Macy's and other retail stores.

Member Miscimarra wrote a lengthy dissent in which he concluded that the bargained-for unit of only cosmetics and fragrances employees was not appropriate under any standard. Rather, he agreed with Macy's that the smallest appropriate unit would include all of the 120 sales employees who work at the store. Member Miscimarra also confirmed his disagreement with *Specialty Healthcare*, stating that he "would not apply Specialty Healthcare [in this case] or in any other decision."

Insights for Employers

The NLRB's decision in *Macy's Inc.* is significant because it will continue to allow unions to strategically control the composition of a bargaining unit, which is a critical factor in a union's ability to prevail in a union election. Employers must therefore be mindful of this issue in preparing for and

responding to union organizing campaigns, as unions are increasingly seeking to organize the smallest subset of employees that they believe they can secure a majority of supporters.

On a broader scale, this case illustrates that despite its recent loss before the U.S. Supreme Court in *Noel Canning* the NLRB's democratic majority is continuing to actively advance its pro-union agenda. Moreover, employers who wish to remain union-free need to carefully examine their workforces to determine whether and where there are pockets of dissatisfaction. They need to respond proactively to the legitimate concerns of those employees to decrease the likelihood that these small groups of employees will become fertile field for the union organizers' seeds of discontent.

Finally, in light of the new "quickie election" rules that the Board has adopted employers must begin to educate their employees about the advantages they derive from being union-free, and about the company's sincere interest in them and in their futures.

Employers must recognize that, like it or not, the Union campaign begins on the day that each employee is hired!